Appendix A

A

[Title of Court and Cause]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This is a seaman's action in admiralty for damages for personal injuries. The issues of maintenance and cure are not embraced within the pleadings. Therefore, they are not included herein. On the pleadings and the evidence, the Court hereby makes the following findings of fact:

FINDINGS OF FACTS

1. Libelant is E. B. Welch, a merchant seaman, now sixty-three years of age and a resident of the City and County of San Francisco, State of California. He has been a licensed Marine Engineer for over twenty years and has a high school education. Mr. Welch holds a Third Assistant Engineer's license for diesel vessels and a Chief Engineer's license for steam vessels.

2. Respondent is American President Lines, Ltd., a corporation, which has a principal place of business in the City and County of San Francisco, State of California.

3. Respondent owned, operated, managed, navigated, maintained and controlled the United States vessel, the SS. PRESIDENT ROOSEVELT, at all times mentioned herein.

4. From April, 1962 to the latter part of February, 1964, Libelant was employed by Respondent aboard the SS. President Roosevelt as a Third Assistant Engineer. He served aboard said vessel on a series of voyages from San Francisco to the Far East and return to San Francisco. Libelant's immediate superior officers in the Engine Department of said vessel, at the time of his injuries in this case, were the Chief Engineer, Mr. Smith, the First Assistant Engineer, Mr. Pak, and the Second Assistant Engineer, Mr. Goodheim.

5. The accident to Libelant occurred in the early afternoon of February 19, 1964 on board the Respondent's vessel which was then in navigable waters at the Port of Los Angeles, California. On the previous day, during the trip from San Francisco to Los Angeles, the ship's standby steam oil lube service pump located in the forward, lower Engine Room, was found to be pounding and not functioning properly, and on the morning of February 19, 1964, the Libelant, on orders of his superior officer, the First Assistant Engineer, commenced to dismantle this pump and make the necessary repairs since the ship could not safely go to sea unless this standby pump was in operating condition. These repairs necessitated the removal of the pistons and crosshead from the pump and required that these parts be carried up from the pump's location in the forward Engine Room to the ship's Machine Shop. In carrying each of these parts from the pump to the Machine Shop, it is necessary to go up one fairly steep ladder, about ten or twelve steps in

the forward Engine Room, then over a coaming of six to eight inches through a watertight door, and across an auxiliary machine space about twenty-five feet; from there it is necessary to go up another short ladder about four steps and then over a six or eight inch coaming of another watertight door and proceed about ten more feet to reach the Machine Shop space. Each of the two pistons contained in this pump and the crosshead (a metal casting which separates the pistons in the pump) are of considerable weight.

6. The job of dismantling this particular pump and carrying its parts to the ship's Machine Shop for repair was rated aboard Respondent's vessel as a two-man job. One of the ship's oilers had, in fact, been assigned to help Libelant with dismantling the pump on the morning of the date of the accident, but the oiler's time was up at noon and he went off duty. Libelant was not provided with a substitute helper and he was left to transport the parts from the pump to the Machine Shop and complete the job alone.

7. In the early afternoon of said date, Libelant proceeded to lift and carry each of the pistons from their location near the pump up to the Machine Shop where he checked them over and then he carried each piston back down from the Shop to the pump. Libelant also lifted and carried the crosshead from the pump up the ladder and over the coaming of the watertight door leading toward the Machine Shop and felt a "pop" in his back. He set the crosshead down and was unable to finish the job. He immediately reported his condition to his superior officers who re-

lieved him from further duty. Libelant sustained injuries to his back and spine in the course of lifting and carrying the crosshead from the pump to the Machine Shop aboard the vessel unassisted on the early afternoon of February 19, 1964.

8. The failure of Respondent, on the afternoon of February 19, 1964, to provide Libelant with sufficient men, specifically an additional man along with Libelant, to perform the required task of dismantling the ship's standby steam oil lube service pump and transporting its parts from the pump to the ship's Machine Shop for repair rendered Respondent's vessel, the SS. President Roosevelt, unseaworthy in that regard.

9. Libelant sustained severe, painful and permanent injuries and damages as a direct and proximate result of the aforesaid unseaworthiness of said vessel.

10. Libelant's injuries sustained in the accident aboard Respondent's ship on February 19, 1964 consisted of a lateral compression fracture of the body of his third lumbar vertebra with nerve root compression and irritation at that level of his spine, causing him much pain and resulting in weakness and atrophy of the musculature of his right leg. In addition, Libelant had a prior non-disabling and asymptomatic arthritic condition of his lumbar spine which was painfully aggravated and made symptomatic as a result of the injuries he sustained at work on February 19, 1964 aboard Respondent's ship.

11. Libelant received initial medical care and treatment for his injuries from the ship's doctor, and

he was placed under medication for severe pain until the vessel reached Honolulu on February 25, 1964. Libelant was there referred to the Public Health Service where he was examined and found to have an acute spinal injury and was repatriated by air to the United States Public Health Service Hospital facility at San Francisco for further care. The fractured vertebra was confirmed by X-ray and examination disclosed a nerve root compression in the lumbar spine, evidenced by painful limitation of back motion and weakness, atrophy, loss of sensation and impairment of the knee reflex in the right leg. Libelant was treated with pelvic traction, bed rest and medication at the San Francisco facility of the Public Health Service Hospital for about eighteen days. Thereafter he was continued as an out-patient at said hospital facility on a regimen of rest and limited activity with prescribed exercises and further medication for pain. Disability involving the back and the right leg persisted and Libelant was made permanently unfit for sea duty by the doctors at the United States Public Health Service Hospital on October 5, 1964. Libelant was treated thereafter at regular intervals as an out-patient at said hospital and also by a private physician, but there has been no change in his condition. Libelant's disabilities occasioned by the accident of February 19, 1964 consist of painful restriction of his back motion and weakness, atrophy and pain in his right leg. By reason of these disabilities, Libelant cannot engage in work requiring heavy lifting, prolonged standing, squatting or requiring the climbing of ladders or repetitive use of his right leg.

12. Since the accident, in an effort to keep working, Libelant has created a job for himself by the purchase of a jitney bus, and since April, 1965, has been operating said vehicle in San Francisco. He is able to work at his own pace and rest on the job since he is his own boss. He has averaged about $200 net per month at this endeavor.

13. Libelant has a life expectancy of 13.8 years.

14. Libelant was earning and was capable of earning Ten Thousand Five Hundred Dollars ($10,500) per year at the time of his accident aboard the SS. President Roosevelt.

15. Libelant sustained an actual loss of earnings and benefits as a result of said accident (with credit given for payment of unearned wages and credit given for actual earnings as a jitney operator) in the sum of Sixteen Thousand Two Hundred Dollars ($16,200).

16. As a direct and proximate result of said accident, Libelant has sustained damages for past pain and suffering in the sum of Five Thousand Dollars ($5,000).

17. As a direct and proximate result of said accident, Libelant has also sustained a permanent partial impairment of his earning capacity with a loss of future earnings. With respect to future earning capacity and by reason of Libelant's prior medical history including the arthritic condition of his back, it is reasonably probable that he could have worked an additional two and one-half years in his usual employment from and after age sixty-three. Accordingly, the

Court finds that Libelant has suffered damages for loss of future earnings in the sum of Fifteen Thousand Seven Hundred Fifty Dollars ($15,750) based upon a partial loss of earning capacity on total annual earning power of Ten Thousand Five Hundred Dollars ($10,500) per year for Libelant's work expectancy of 2.5 years, discounted to present value at 3.5% per annum.

18. With regard to future pain, suffering and discomfort as a result of said accident, Libelant has suffered damages in the additional sum of One Thousand Five Hundred Dollars ($1,500).

19. Libelant has sustained damages in the total sum of Thirty-Eight Thousand Four Hundred Fifty Dollars ($38,450) as a direct and proximate result of the accident suffered by him aboard the SS. President Roosevelt on February 19, 1964.

20. Libelant was guilty of contributory negligence for his failure to request additional help of his superiors to aid him in his assigned task on the afternoon of February 19, 1964. Libelant's own negligence, as aforesaid, contributed fifty per cent (50%) to the accident and the consequences to him.

21. After deducting for Libelant's contributory fault the sum of Nineteen Thousand Two Hundred Twenty-Five Dollars ($19,225), which represents fifty per cent (50%) of Libelant's total damages, the total amount recoverable by Libelant from the Respondent in this case is the sum of Nineteen Thousand Two Hundred Twenty-Five Dollars ($19,225).

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the subject matter and of the parties.

2. Libelant's injuries and damages were proximately caused by the unseaworthiness of the Respondent's vessel, the SS. President Roosevelt, on the afternoon of February 19, 1964. See *American President Lines, Ltd. v. Redfern* (9 CCA 1965), 345 F. 2d 629; also *June T., Inc. v. King,* 290 F. 2d 404.

3. Libelant sustained total damages, before deduction for his own contributory negligence, in the sum of Thirty-Eight Thousand Four Hundred Fifty Dollars ($38,450) as a direct and proximate result of the accident on board Respondent's ship, the SS. President Roosevelt, on the afternoon of February 19, 1964.

4. Libelant's own negligence contributed fifty per cent (50%) to the accident and consequences to Libelant.

5. Libelant is entitled to a Judgment and Final Decree for damages for personal injuries in his favor and against American President Lines, Ltd., a corporation, in the sum of Nineteen Thousand Two Hundred Twenty-Five Dollars ($19,225), plus costs of suit, and with interest at the legal rate of seven per cent (7%) per annum from November 24, 1965.

Dated: November 24, 1965.

Bruce R. Thompson
United States District Judge

B

[Title of Court and Cause]

FINAL DECREE

The above entitled cause came on regularly for trial on November 1, 1965, in the above entitled Court before The Honorable Bruce R. Thompson, United States District Judge, sitting in Admiralty, the parties appearing in person or by their respective proctors; Messrs. Jarvis, Miller & Stender and Martin J. Jarvis, Esquire, appearing as proctors for the Libelant, E. B. Wech, and Messrs, Lillick, Geary, Wheat, Adams & Charles and Frederick W. Wentker, Jr., Esquire, appearing as proctors for Respondent, American President Lines, Ltd.. The trial in the action commenced on the 1st day of November, 1965 and concluded on the 2nd day of November, 1965, and oral and documentary evidence having been introduced on behalf of the respective parties, and the Court having fully considered the facts and the law and the arguments of counsel, and having been fully advised, and the cause having been submitted for decision, the Court having heretofore made and caused to be filed herein its written Findings of Fact and Conclusions of Law, and good cause appearing therefor,

Now, Therefore, by reason of the law and the Findings of Fact aforesaid, It Is Ordered, Adjudged and Decreed:

That the Libelant, E. B. Welch, do have and recover of and from the Respondent, American President Lines, Ltd., a corporation, damages for personal

injuries in the sum of Nineteen Thousand Two Hundred Twenty-Five Dollars ($19,225), lawful money of the United States of America, with interest thereon at the rate of seven per cent (7%) per annum from November 24, 1965 until paid, together with Libelant's costs incurred in this action amounting to the sum of $175.59, and that Libelant have execution therefor against Respondent unless this decree be satisfied within ten (10) days after entry of this decree and service of a copy of this decree on Respondent or its proctors.

Dated: November 24, 1965.

Bruce R. Thompson
United States District Judge

Original Filed November 26, 1965
Clerk, U. S. Dist. Court

Appendix B

United States Court of Appeals
for the Ninth Circuit

American President Lines, Ltd.,
a corporation,
Appellant and Cross-Appellee,
vs.
E. B. Welch,
Appellee and Cross-Appellant.

No. 21,016

[April 21, 1967]

On Appeal from the United States District Court
for the Northern District of California
Southern Division

Before: HAMLEY, HAMLIN and DUNIWAY,
Circuit Judges

HAMLIN, Circuit Judge:

E. B. Welch, appellee herein, filed an action in the United States District Court for the Northern District of California, Southern Division, against American President Lines, Ltd., appellant herein, seeking damages for injuries received while he was a seaman aboard the SS PRESIDENT ROOSEVELT, a vessel owned by appellant. Appellee alleged that his injuries were proximately caused by the unseaworthi-

ness of appellant's vessel in that appellant did not supply appellee "sufficient personnel or assistance necessary for the performance of his said duties aboard said vessel." The district court, without a jury, found for appellee holding that his damages amounted to $38,450, and that his own negligence contributed 50 per cent to the accident. Judgment was entered against appellant in the sum of $19,225.00. Appellant appeals from the finding of unseaworthiness, and appellee cross-appeals from the finding of contributory negligence.

Appellee is a merchant seaman holding a third assistant engineer's license for diesel vessels and a chief engineer's license for steam vessels. From April, 1962, to the latter part of February, 1964, he was employed as a third assistant engineer aboard the SS PRESIDENT ROOSEVELT.

On February 18, 1964, while the vessel was enroute from San Francisco to Los Angeles, it was discovered that the standby lube oil pump in the lower engine room was not operating properly. This pump cuts in service if the main lube oil pump fails and must function properly before the ship can safely proceed to sea. On the morning of February 19, 1964, when the vessel was in Los Angeles Harbor, the first assistant engineer, appellee's superior officer, instructed appellee to dismantle the pump and make the necessary repairs. Repairing the pump required removing its two pistons and crosshead and carrying them from the lower engine room to the ship's machine shop. Each part would have to be carried from the lower engine room

up a ladder of approximately ten steps, over a six or eight-inch coaming, then along approximately 25 feet past a storekeeper's door, then up three or four steps and over another coaming six or eight inches high, and then approximately ten feet more into the machine shop. The testimony was that the operation of dismantling the pump and carrying each piston and the crosshead to the machine shop is a two-man job. There was no contrary testimony upon this issue. Each piston weighs in excess of a hundred pounds. There was testimony estimating the weight of the crosshead at over a hundred pounds, but during the trial appellant produced evidence showing that it weighed forty-two pounds.

During the morning work in dismantling the pump an oiler was assigned to assist appellee. However, at noon his watch was finished and he left the job. When the oiler left, the pistons and the crosshead had been removed from the pump but were still in the lower engine room. After lunch appellee returned to the work alone. He first carried one piston from the lower engine room to the machine shop over the route above described, taking it up the ladder one step at a time. When the piston reached the machine shop it was examined and returned to the lower engine room over the same route. Appellee then took the second piston and carried it up in the same way to the machine shop where it too was checked. He then took this piston back again to the lower engine room. Appellee testified that after this his back felt tight and "it was a pretty heavy lift." Appellee then testified that he took the

crosshead up toward the machine shop and on the way he heard a slight "pop" in his lower back. He did not feel any immediate pain, and after putting the crosshead down for a few moments, he "kind of straightened" himself out and picked up the crosshead, and continued to the machine shop. In the machine shop he did certain work upon the crosshead.

He left the crosshead in the machine shop for further repair and went back to the engine room. His back was beginning to pain him at that time and he reported that fact to his superior, the second engineer. After resting for a while he went up to his quarters. About four o'clock he reported his condition to the first engineer and was told to knock off for the rest of the day. The ship sailed the next day for Honolulu, and appellee stayed in his bed during the trip. He testified that he was suffering pain in his right hip and right leg. He was given medical attention by the ship's doctor during the trip. In Honolulu appellee received further medical and hospital care, and was certified as unfit for duty. Transportation was arranged for him to fly to San Francisco where he received medical attention at the Public Health Service Marine Hospital. He remained in the hospital for 17 or 18 days and was in traction. Upon discharge he received out-patient care and was finally declared permanently unfit for sea duty in October, 1964. He remained in that status up until the time of trial.

The injuries received by appellee on February 19, 1964, were diagnosed as "a lateral compression fracture of the body of his third lumbar vertebra with

nerve root compression and irritation at that level of his spine, causing him much pain and resulting weakness and atrophy of the musculature of his right leg."

Among others, the district judge made the following findings:

> 6. The job of dismantling this particular pump and carrying its parts to the ship's Machine Shop for repair was rated aboard Respondent's vessel as a two-man job. One of the ship's oilers had, in fact, been assigned to help Libelant with dismantling the pump on the morning of the date of the accident, but the oiler's time was up at noon and he went off duty. Libelant was not provided with a substitute helper and he was left to transport the parts from the pump to the Machine Shop and complete the job alone.
>
> 7. In the early afternoon of said date, Libelant proceeded to lift and carry each of the pistons from their location near the pump up to the Machine Shop where he checked them over and then he carried each piston back down from the Shop to the pump. Libelant also lifted and carried the crosshead from the pump up the ladder and over the coaming of the watertight door leading toward the Machine Shop and felt a "pop" in his back. He set the crosshead down and was unable to finish the job. He immediately reported his condition to his superior officers who relieved him from further duty. Libelant sustained injuries to his back and spine in the course of lifting and carrying the crosshead from the pump

to the Machine Shop aboard the vessel unassisted on the early afternoon of February 19, 1964.

8. The failure of Respondent, on the afternoon of February 19, 1964, to provide Libelant with sufficient men, specifically an additional man along with Libelant, to perform the required task of dismantling the ship's standby steam oil lube service pump and transporting its parts from the pump to the ship's Machine Shop for repair rendered Respondent's vessel, the SS. President Roosevelt, unseaworthy in that regard.

9. Libelant sustained severe, painful and permanent injuries and damages as a direct and proximate result of the aforesaid unseaworthiness of said vessel.

* * * * * * *

19. Libelant has sustained damages in the total sum of Thirty-Eight Thousand Four Hundred Fifty Dollars ($38,450) as a direct and proximate result of the accident suffered by him aboard the SS President Roosevelt on February 19, 1964.

20. Libelant was guilty of contributory negligence for his failure to request additional help of his superiors to aid him in his assigned task on the afternoon of February 19, 1964. Libelant's own negligence, as aforesaid, contributed fifty per cent (50%) to the accident and the consequences to him.

21. After deducting for Libelant's contributory fault the sum of Nineteen Thousand Two

Hundred Twenty-Five Dollars ($19,225), which represents fifty per cent (50%) of Libelant's total damages, the total amount recoverable by Libelant from the respondent in this case is the sum of Nineteen Thousand Two Hundred Twenty-Five Dollars ($19,225).

Appellant makes the following specifications of errors:

1. The District Court's Finding No. 6 is clearly erroneous to the extent that it states that carrying the crosshead in this case was rated as a two-man job, since there was no evidence that the carrying of such a 42-pound crosshead was a two-man job.

2. The District Court erred in finding and holding (Finding No. 8: Conclusion No. 2) that the vessel was unseaworthy because it failed to provide two men to carry the 42-pound crosshead, since the carrying of such an object by one man was within usual and customary standards and the warranty of seaworthiness with respect to crew requires that the vessel be adequately manned overall but not that a particular number of men be assigned to perform each task aboard.

The contention as to Specification No. 1 is quickly answered. There is ample testimony in the record not only that the work of dismantling and repairing this pump was a two-man job but there was also testimony that the carrying of each piston and of the crosshead was a two-man job. Appellant produced no witness to testify to the contrary.

The owner of a vessel has an absolute and nondelegable duty to provide a seaworthy ship. Mahnich v. Southern S.S. Co., 321 U.S. 96; Hudson Waterways Corp. v. Schneider, 365 F.2d 1012, 1014 (9th Cir. 1966). Not only must the things about a ship be reasonably fit for the purpose for which they are to be used, Gutierrez v. Waterman S.S. Corp., 373 U.S. 206, but the ship must be properly manned. "[T]o be inadequately or improperly manned is a classic case of an unseaworthy vessel. See Boudoin v. Lykes Bros. S.S. Co., Inc., 1955, 348 U.S. 336, 75 S.Ct. 382, 99 L.Ed. 354, 1955 A.M.C. 488." June T., Inc. v. King, 290 F.2d 404, 407 (5th Cir. 1961).

Appellant asserts that they are obligated to provide an adequate overall crew but not an adequate number of men for each task on the vessel. American President Lines, Ltd. v. Redfern, 345 F.2d 629 (9th Cir. 1965) is to the contrary and is controlling. In that case the watch officer ordered Redfern to "go down and change from high suction to low suction," an operation that required opening the gate valves located on either side of the vessel and closing a corresponding pair of valves at a higher level. He attempted to open one of the valves by turning its 30-inch diameter wheel but it was stuck. On the third attempt to turn the wheel he injured his back. This court held:

> "A stuck sea valve, the trial judge found—and the finding is supported by substantial evidence—is suitable only if operated by two men; otherwise, it constitutes a dangerous condition. . . .

> In this setting, we are satisfied that the court was justified in determining that the HOOVER was not reasonably fit for service because she was improperly manned—'a classic case of an unseaworthy vessel.'"

In the present case repairing the lube pump was a two-man job and it was dangerous for one man to proceed alone. We hold that the SS PRESIDENT ROOSEVELT was improperly manned when appellee repaired the lube pump without being supplied with adequate help.

Appellee has cross-appealed from the finding of his contributory negligence. Contributory negligence is not an absolute defense under maritime law, but rather it is a basis to apportion damage. The trial court found appellee contributorily negligent in the amount of 50 per cent because he failed to request additional help; we are bound by this finding unless it is "clearly erroneous." American President Lines, Ltd. v. Redfern, supra.

Appellee's superior officer was in the engine room while appellee repaired the lube pump. He had authority to assign an extra man to help in the repair if requested. In our opinion it was not clearly erroneous to hold that a reasonable man would have asked for help and the fact that appellee did not ask for help contributed to his resulting injury.

Judgment affirmed.

[Title of Court and Cause]

JUDGMENT OF COURT OF APPEALS

Appeal from the United States District Court
for the Northern District of California,
Southern Division

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered April 21, 1967.

United States Court of Appeals for the Ninth Circuit

(Excerpt from Proceedings of Friday, May 26, 1967)

Before: Hamley, Hamlin and Duniway,
Circuit Judges

ORDER DENYING PETITIONS FOR REHEARING

On consideration thereof, and by direction of the Court, It Is Ordered, that the petition of the appellant and Cross-Appellee American President Lines, Ltd., filed on May 19, 1967, and the petition of the appellee and Cross-Appellant E. B. Welch, filed on May 19, 1967, and within time allowed therefor by rule of Court, for a rehearing of the above cause be, and hereby are denied.

Appendix C

FROM BRIEF FOR APPELLEE AND CROSS-APPELLANT (pp. 29-31):

A. There Is No Evidence in the Record That Additional Help Was Available at Hand. There Is a Failure of Proof by the Shipowner on This Issue.

The finding that appellee was guilty of contributory negligence because he failed to request another assistant when the initial helper left before the job was completed, must have as its evidentiary premise, that a substitute or other help was available at that time. The record, however, contains no such factual support. Indeed, there is substantial evidence to the contrary; that no additional available help was at hand. Furthermore, the shipowner had the burden of proof on this issue.

Mr. Goodheim, who was the engineer on watch in the forward engine room and who was appellee's immediate superior described the situation on the early afternoon of February 19, 1964 in the following words:

> "Q. To your knowledge where were the other engineers and the other members of the unlicensed personnel (that is the black gang) at the time that Mr. Welch was carrying or transporting this particular crosshead up to the machine shop?
>
> A. In the other engine room working on the boilers.
>
> Q. To your knowledge what was the matter or condition of the boilers in the after engine room of the ship?

A. I believe they were leaking.

Q. Was that the situation in the early afternoon of February 19, 1964?

A. Yes sir.

Q. Was there any extra help available to Mr. Welch at the time that he, as you saw, carried this crosshead from the lower flat up to the machine shop?

A. No sir.

Q. Where was the First Assistant Engineer, to your knowledge?

A. Back with the boilers, with the rest of the crew." (Goodheim, 7-8).

Moreover, the engine storekeeper who had authority to call out wipers (maintenance men) as helpers was not in his office, the door to which was padlocked at the time (R. II, 69). Mr. Pak, the First Assistant, who had primary authority to assign unlicensed personnel, was busy in the after engine room (Pak 10). Although Mr. Pak indicates it was his practice to assign men if requested, he fails to indicate whether a man was in fact available on that occasion (See Pak 10, 25-26). And appellee, himself, testified that he did not ask for help because "there was no one around." (R. II, 68).

The District Court is not permitted to base its finding of contributory negligence on conjecture concerning availability of crew members for assignment to aid Mr. Welch in the required task. This is especially true where all the evidence and all reasonable inferences from the evidence point to the opposite conclusion.

FROM CROSS-APPELLANT'S REPLY BRIEF (pp. 2-5):

2. The Record in This Case—Failure of Proof on the Contributory Fault Issue.

Cross-Appellee, in its Answering Brief, has failed to cite *any* evidence contained in the record which demonstrates that a "safe alternative (assistance)" *was available* to Mr. Welch on the afternoon of February 19, 1964. Instead, the shipowner seeks to construct a theory based on pure speculation which it characterizes as "circumstantial evidence" to remedy this deficiency in proof. It argues that (1) ". . . it was Pak's practice and responsibility to assign men to assist others when requested"; and (2) "members of the crew were working nearby". (Cross-Appellee's Answering Brief, p. 10.) Thus, the shipowner's argument goes, someone, somewhere, would have been assigned, had a request been made. Such argument is specious and unsound. The invalidity and speculative nature of the shipowner's position is in fact revealed by Cross-Appellee's own statement that "testimony concerning *which* man was available for such task would be too 'speculative' ". (Cross-Appellee's Answering Brief, p. 10.)

The reason that Cross-Appellee does not desire to dwell on the question of who, if anyone, would have been assigned to help Mr. Welch is that the record affirmatively shows there in fact was no one available for such assignment at the time. Although Cross-Appellant did not have the burden of coming forth or going forward with proof that help was unavailable, the only evidence in the record supports this view.

While Mr. Pak, the First Assistant Engineer, did testify that *normally* "he could supply help on request" he also affirmed that ". . . the situation wasn't normal. We had a lot of repairs going on." (Pak, 33.) Mr. Goodheim, the Second Assistant Engineer, who was Mr. Welch's immediate supervisor, testified as follows:

"Q. Did you have any supervisorial duties over Mr. Welch in connection with his repair to this pump that he was working on?

A. Yes.

Q. What were your duties?

A. I was in charge of the work in the forward engine room.

Q. Well, were you in charge of the repair which he was doing, or was he in charge of it, or were you both in charge of it? Please explain the relation to me.

A. As senior engineer I was the man that was responsible.

Q. Did you instruct him to do this job?

A. Yes.

Q. Did you assign any help to him?

A. Yes.

Q. How much help did you assign to him?

A. I think he had one man with him in the morning, *as long as it was possible to keep him on the job with him.*

Q. Was there more than one man assigned to work with Mr. Welch?

A. I believe there was a wiper and a maintenance man, originally.

Q. Do you recall their names?

A. No I don't.

Mr. Jarvis: You are talking about the morning of the same day.

The Witness: The morning.

Mr. Jarvis: Up until noon.

The Witness: At the starting of the job.

Q. (By Mr. Wentker) Is it your testimony that sometime during the day these two men, or one man, whatever the case may have been, were taken away from that job?

A. Yes sir.

Q. Did you see them taken away?

A. They were taken away on the First Assistant's orders.

Q. That, you believe, is Mr. Smith?

A. Yes.

Q. Did anybody come and tell you that these men were to be taken away?

A. I believe one of the other Seconds informed me that all men were going to the after engine room on the boilers." (Goodheim, 25-26.) (Emphasis added)

Thus, during the entire afternoon up to and including the time of injury, all of the evidence in the record indicates that the vessel's engine room was plagued with many problems. Both Welch and Goodheim were without assistance, and the men who had been assigned to the forward engine room that morning had been sent into the after engine room to work on the leaky boilers. It was, as Mr. Pak testified, an "abnormal situation". If there are any inferences to be drawn from the evidence in the record, it is certainly not that a man would have been assigned if requested. It is rather clear, without inference, that

there was no one available at the time to assist Mr. Welch, and it was necessary for him to finish the assigned task with whatever means he had at hand.

FROM CROSS-APPELLANT'S PETITION FOR REHEARING (pp. 1-2):

Cross-Appellant, E. B. Welch, hereby petitions for a rehearing on his Cross-Appeal, respectfully requesting this Court to reconsider that portion of the decision and judgment entered on April 21, 1967 in this action regarding the issue of contributory negligence, on the following grounds:

1. Prejudicial omission of a material fact: The record below shows without conflict that no help or helpers (men) were in fact available to aid Cross-Appellant, had he requested help in connection with the assigned task (Goodheim, 7-8; 25-26; R. II, 69; R. II, 68; Pak 10, 25-26, 33).[1] The Court of Appeals omitted this material fact from its opinion; had the Court of Appeals considered this undisputed fact, the finding of the District Judge must be reversed on the issue of contributory negligence as clearly erroneous, because Cross-Appellant's failure to request help, *where no help was in fact available,* could not then have contributed to the occurrence of the accident as a matter of law.